

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID BROWN,

Plaintiff,

Case No. 1:12-cv-873

v

HON. JANET T. NEFF

JOHN PRELESNIK, et al.,

Defendants.

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OPINION AND ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983 against the Michigan Department of Corrections (MDOC) and several prison employees. Defendants filed a Motion for Summary Judgment, arguing that Plaintiff has not properly exhausted the claims still at issue in this action. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R), recommending that this Court deny Defendants' motion. The matter is presently before the Court on Defendants' objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Defendants first assert that Plaintiff's Grievance ICF-11-08-1589-26 serves to properly exhaust only Plaintiff's claim against Defendant LeBarre, an assertion for which Defendants find support in the Step III reason for appeal (Objs., Dkt 56 at 2). However, as the Magistrate Judge

emphasized, Defendants bear the burden of establishing exhaustion, and, without a copy of the Step I grievance, the Court cannot discern the nature of this particular grievance or against whom it was asserted. Therefore, this objection is denied.

Next, Defendants argue that Grievance ICF-13-02-263-2z cannot exhaust Plaintiff's claim because the Step III grievance was not decided until August 13, 2013, after Defendants filed their motion on May 30, 2013 (Objs., Dkt 56 at 2). The Magistrate Judge, however, determined that the grievance may nonetheless exhaust Plaintiff's claim where the grievance process was not completed within 120 calendar days, pursuant to MDOC guidelines (R&R, Dkt 56 at 2). Defendants argue that the Magistrate Judge's "120 days" analysis is incorrect because the Step I grievance was "likely filed in early March of 2013" (Objs., Dkt 56 at 2-3), but Defendant's argument fails to demonstrate any error in the Magistrate Judge's analysis. Indeed, the time period from the receipt of the Step II grievance on March 21, 2013 to the filing of the Step III grievance response on August 13, 2013 is greater than 120 calendar days, indicating Defendants' noncompliance with the MDOC's "120 days" guideline. This objection is therefore denied.

Third, Defendants argue that Grievance ICF-11-04-0809-03f was untimely submitted by Plaintiff at Step III and that the Magistrate Judge therefore erred in determining that Defendants did not meet their burden of proving that Plaintiff failed to exhaust his claim (Objs., Dkt 56 at 3). Even assuming, *arguendo*, that Defendants' timeliness argument has merit, the argument does not demonstrate error in the Magistrate Judge's determination that "the Court cannot discern the nature of this particular grievance or against whom it was asserted" without a copy of the Step I grievance (R&R, Dkt 53 at 8). Therefore, this objection is denied.

Last, Defendants assert that Grievance ICF-12-04-0588-27z “exhausts Plaintiff’s ADA claim, but no other claims,” an assertion for which Defendants find support in the Step II reason for appeal (Objs., Dkt 56 at 4). However, without the Step I grievance, the Magistrate Judge properly determined that Defendants did not meet their burden of proving that Grievance ICF-12-04-0588-27z did not exhaust Plaintiff’s other claims. Therefore, this objection is likewise denied.

Accordingly, this Court adopts the Magistrate Judge’s Report and Recommendation as the Opinion of this Court. Therefore:

IT IS HEREBY ORDERED that the Objections (Dkt 56) are DENIED and the Report and Recommendation (Dkt 53) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (Dkt 31) is DENIED.

Dated: February 18, 2014

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge